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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 386

JESSE M. CARNEY AND MILTON GRADY RAMSEY,
PETITIONERS
v.
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 129–144) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered August 22, 1947 (R. 145), and a petition for rehearing was denied September 17, 1947 (R. 146). The petition for a writ of certiorari was filed October 4, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act

of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a search warrant under which counterfeiting materials and counterfeit ration coupons were discovered and seized was invalid for alleged lack of a showing of probable cause in the supporting affidavits or for alleged failure to specify the items to be seized, and whether the officers were authorized to seize contraband not specified in the warrant.

2. Whether the circuit court of appeals erred in affirming petitioners' convictions on count 2 after reversing the convictions on count 1 because of an amendment of that count made in the trial court.

3. Whether the evidence is sufficient to support petitioners' convictions of possessing counterfeit ration coupons with intent to utter and publish them as true.

4. Whether the trial court erred in refusing petitioners' proffered instructions setting forth the theory of their defense and the evidence to support it.

5. Whether printed ration coupons are "writings" within the meaning of the forgery and counterfeiting statute.

STATUTE INVOLVED

Section 28 of the Criminal Code (18 U. S. C. 72) provides in pertinent part:

> Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid or assist in the false making, altering, forging, or counterfeiting, any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States; or shall utter or publish as true, or cause to be uttered or published as true, or have in his possession with the intent to utter or publish as true, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States, knowing the same to be false, forged, altered, or counterfeited; * * * shall be fined not more than $1,000 or imprisoned not more than ten years, or both.

STATEMENT

On January 10, 1945, an indictment in two counts was returned against petitioners in the District Court for the Southern District of California (R. 2–3). The first count charged that on

or about December 1, 1944, they made, forged, and counterfeited, with intent to defraud the United States, "certain writings, to wit: K–14 h gasoline ration coupons" (see R. 2, 7, 129–130, 138–139). The second count alleged that on or about December 11, 1944, petitioners had in their possession, with intent to defraud the United States and to utter and publish as true, "certain false and counterfeit writings, to wit: 2250 Series A–14 h ration coupons," knowing them to be false and counterfeit (R. 2–3).

After the jury was empaneled but before any evidence was adduced, count 1 was amended, with the consent of counsel, by substituting the letter A for K in the description of the coupons (R. 7), apparently on the ground that the K was an inadvertent or typographical error (see R. 143).

Petitioners were convicted on both counts (R. 11), and they were each sentenced to imprisonment for five years on count 1 and three years on count 2. Execution of the sentences on the first count was suspended, and they were placed on probation for five years to commence upon their release from imprisonment under the sentences on count 2 (R. 12–15).

On appeal to the Circuit Court of Appeals for the Ninth Circuit, the convictions on count 2 were affirmed, but the convictions on the first count were reversed (R. 145) on the ground that the amendment of that count without reassembling

the grand jury ousted the trial court of jurisdiction to proceed on it (R. 138–143).

The evidence and proceedings relating to the issues raised by the petition for a writ of certiorari may be summarized as follows:

Prior to petitioners' arrest and indictment the fact that counterfeit gasoline ration coupons were circulating in Los Angeles was brought to the attention of local O. P. A. officials by a service station operator who had received such coupons in exchange for gasoline. Similar counterfeit coupons also appeared at the San Francisco Verification Center of the Office of Price Administration. (R. 81–82.) An investigation was made (see R. 84–85), as a result of which application was made to a United States Commissioner for a warrant to search premises occupied by petitioners. The affidavits of an agent of the Currency Protection Branch of the Office of Price Administration and a Secret Service agent in support of this application recited in detail that the agents had personally seen petitioners enter certain business establishments in Los Angeles where they purchased type similar to type used in printing gasoline ration coupons and that investigation at other establishments which they had seen petitioners enter disclosed that petitioners had purchased inks and tints in colors similar to those used in processing paper for printing coupons, as well as a sheet of brass plating, a perforating

rule and a hand press suitable for use in printing coupons. Petitioners used fictitious names in making these purchases. The agents also saw petitioners take the materials they had purchased to a residence at 2433 Exposition Place. (R. 26–30.) On the basis of these affidavits the Commissioner issued a warrant (R. 23–24) addressed to named agents of the Secret Service commanding them

> to enter the said premises above described and with the necessary and proper assistance of persons by you authorized, acting in your presence, in the day or night time, then and there to search the said premises, including outbuilding, cellars, passageways, and rooms connected therewith, for the property, articles and things above described, which may be found to be located in and upon the premises above described or in any part thereof, and to seize and bring the same before me * * *.

The warrant described the property sought under it as

> one hand press, brass sheeting, gothic, bold faced and light line type, printing inks, one six-inch roller, perforating rules and type clamp.

The agents named in the warrant, accompanied by two special agents of the O. P. A., proceeded to the premises designated in the warrant, where they observed the arrival of petitioner Carney in an automobile. Carney removed a large package

from the automobile and carried it to a garage at the rear of the premises and there petitioner Ramsey opened the garage door and admitted him. (R. 60.) Two of the agents then went to the garage and, finding the door slightly ajar, entered (R. 61, 68). As they did so they observed both petitioners standing at a hand printing press; Ramsey "had just turned loose of the handle," which was still spinning (R. 61, 70). The agents identified themselves and tendered the search warrant, but petitioners refused to accept it (R. 61, 67, 70). Thereupon petitioners were arrested (R. 61, 67–68, 70) and the warrant was placed on a work bench next to the printing press (R. 61–62). Later, on the advice of one of the agents, Ramsey picked up the warrant (R. 62).

On the bed of the printing press was a freshly inked plate with a background "as used on gasoline ration coupons" on which were about 60 sets of the letters "U. S. A." (R. 62, 66, 77; Gov. Ex. 2, R. 67). Near the printing press the agents found "quite a few articles as used in printing, gasoline ration coupons, printing inks, different kind of inks, papers, different kind of types, also perforated rule, what we call it for perforation marks, uncut papers, and also large bundles of already cut papers as found on the bed of this press" (R. 62; see also R. 66 and Gov. Ex. 2, R. 67). When questioned by the agents concerning these articles, petitioners re-

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plied that they "had nothing to say" (R. 69). Thereafter, two of the agents remained in the garage with Carney while the other two went into the house with Ramsey (R. 62). Neither of the petitioners at any time attempted to exclude the agents from the premises (R. 69). In the various rooms of the house the agents found a large number of partially printed and finished sheets of counterfeit gasoline ration coupons scattered upon the floor, tables, etc., for drying (R. 63, 72–74, 79–80; Gov. Exs. 1, R. 63–64, 5, R. 74). The agents also searched both petitioners and found a number of counterfeit ration coupons which were similar in every way, including serial numbers, with those found in the house (R. 70–72, 78). The counterfeit coupons found on the premises were likewise similar to those which had previously been turned in to O. P. A. by the gasoline station operator (R. 85; see p. 5, *supra*).

The agents seized all of the above described counterfeiting equipment and the counterfeit ration coupons, and, as required by the terms of the warrant, made a return listing all the items thus seized (see R. 25–26).

Prior to trial petitioners moved in the district court to quash the search warrant and for an order to return the seized items to them on the grounds, *inter alia,* that the affidavits upon which the warrant was issued did not sufficiently show

probable cause and that the warrant insufficiently identified the property to be taken thereunder (R. 31–43). The motion was denied (R. 5; see also R. 58–59).

ARGUMENT

1. Petitioners' principal contention here renews their objections to the search warrant and to the seizure first asserted in the trial court (Pet. 4, 6, 10, 11–12). However, as we have already indicated, the affidavits in support of the application for the issuance of the warrant described in detail the observations of the government agents that petitioners had purchased many different items similar to those used in making ration coupons, that the purchases had been made under fictitious or assumed names and that the materials thus acquired were taken by petitioners to the premises for which the search warrant was sought. While it may be that the evidence thus placed before the commissioner might not, standing by itself, be sufficient to support a conviction of the offenses for which petitioners were indicted, nevertheless, it was plainly admissible evidence and was obviously such as to warrant a man of prudence and caution in believing that the felonies of counterfeiting and illegal possession of counterfeit writings were being or had been committed at the premises in question. Accordingly, there was,

within the statutory requirements,[1] sufficient showing of probable cause for the issuance of the search warrant. See, e. g., *Carroll* v. *United States*, 267 U. S. 132, 161; *Dumbra* v. *United States*, 268 U. S. 435, 441; *United States* v. *McGuire*, 300 Fed. 98, 102 (N. D. N. Y.), affirmed, 6 F. 2d 576 (C. C. A. 2). Not only were there sufficient facts and circumstances showing probable cause for the issuance of the warrant, but the warrant did not, as petitioner asserts (see Pet. 10), give the officers blanket authority for an exploratory search; on the contrary it specifically itemized the materials and instruments to be

[1] The Act of June 15, 1917, c. 30, Title XI, 40 Stat. 228, provides in pertinent part:

"Sec. 3 [18 U. S. C. 613] A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched.

* * * * * * *

"Sec. 5 [18 U. S. C. 615] The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

"Sec. 6 [18 U. S. C. 616] If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner."

seized. While it is true that the materials and equipment actually seized by the officers included items, especially the counterfeit coupons, in addition to those specified in the warrant, the seizure of such items was proper under the circumstances. The additional items seized were similarly instrumentalities of the offenses on the basis of which the warrant was issued and were, it would now seem, subject to seizure upon discovery in the course of the lawful search. *Harris* v. *United States,* 331 U. S. 145, 154–155; cf. *Marron* v. *United States,* 275 U. S. 192, 195–198. In addition, because of the variety of materials that might be utilized in counterfeiting operations, greater particularity would have been difficult, if not impossible. Cf. *Nuckols* v. *United States,* 99 F. 2d 353, 355 (App. D. C.), certiorari denied, 305 U. S. 626. Moreover, when the officers entered the premises they had full and convincing visual evidence that their arrival had temporarily interrupted petitioners' counterfeiting operations, for not only were the premises littered with counterfeiting apparatus, but the ink was still wet on the press. In these circumstances, their arrest of petitioners was lawful. Having made lawful arrests for crimes being committed in their presence on premises they had lawfully entered under the warrant, the officers were authorized to seize all the instrumentalities of the crime in open sight on the premises and to

search the persons of petitioners. See, e. g., *Harris* v. *United States, supra; Marron* v. *United States,* 275 U. S. 192; *Agnello* v. *United States,* 269 U. S. 20; *Cheng Wai* v. *United States,* 125 F. 2d 915 (C. C. A. 2).

Since, as we have shown, the search and seizure were executed under a valid search warrant which directed a search of "out-buildings" as well as the residence building, there is no occasion to consider the question discussed by the court below (R. 132–133) and renewed in the petition (Pet. 11) as to whether a garage is covered by the protection of the Fourth Amendment.[2]

2. Petitioners contend that the reversal below of their convictions on count 1 nullified the convictions on count 2 because "the evidence on which Count One was based, was the basis for returning Count Two which charged 'uttering and publishing with intent to defraud the United States' by the ration coupons referred to in Count One" (Pet. 12). However, each count of the indictment must be regarded as if it were a seperate indictment and therefore the invalidation of count 1 did not affect the validity of count 2. Petitioners were in no wise prejudiced by the evidence adduced as to count 1, for they

[2] It should be noted that only petitioner Ramsey claimed the right to the possession of the premises searched, and that petitioner Carney was neither the owner nor the occupant of those premises (R. 31, 94). Accordingly, Carney has no standing to complain of the search and seizure.

consented to the amendment of the latter count before trial. Additionally, by reason of the relation of the offenses described in both counts of the indictment, most, if not all, of the evidence adduced at the trial would have been admissible even if count 1 had never been included in the indictment.

3. Petitioners also contend that the mere proof of their possession of counterfeit gasoline ration coupons with nothing more did not establish the requisite statutory intent to utter and publish them as true and to defraud the United States (Pet. 5, 13). It should be noted in this connection that petitioners did not make this point in the trial court either by motion for a directed verdict or otherwise. In any event, there was abundant evidence from which the jury could, as it did, conclude that petitioners intended to utter and publish the ration coupons as true. For example, the Government showed that other counterfeit ration coupons had already been uttered and distributed which were of the same series and characteristics as those found on petitioners' persons and at the premises where they conducted their counterfeiting operations. Moreover, from the total evidence as to petitioners' surreptitious counterfeiting operations, the jury could fairly infer that petitioners' motive in counterfeiting on such a scale was to distribute to their profit the counterfeit coupons.

4. Petitioners further contend that the trial court erred in refusing their proffered instructions incorporating their theory of the case (Pet. 5, 14). These instructions, predicated on the testimony of petitioner Carney that the symbols petitioners printed were intended for use on a victory day restaurant menu (R. 90–97), purported to pose for the jury the question whether petitioners had the requisite unlawful intent by reviewing for the jury the defense's view of the evidence (R. 118–119). It is clear, however, that there was no error in refusing such instructions, for a federal trial judge in presenting the theory of the defense, is not obliged to comment on the evidence in a criminal case. See, e. g., *United States* v. *Cohen,* 145 F. 2d 82, 92 (C. C. A. 2). Petitioners are therefore in no position to urge that they were prejudiced because the judge, in presenting the issues to the jury and in the legitimate exercise of his discretion, did not comment on any evidence in the case. The proposed instructions went solely to the issue of intent and that issue was submitted to the jury under full and correct instructions, not here attacked, which described for the jury the intent they were required to find before they could convict (see R. 101–102). Moreover, the trial judge carefully instructed the jury that a defendant is a competent witness on his own behalf and that his testimony is entitled to full and fair consideration

(R. 102), thus giving the jury full opportunity to evaluate, along with the other evidence, petitioners' defense.

5. Finally, petitioners contend that since ration coupons are printed, they are not "other writings" within the meaning of the counterfeiting statute (*supra*, p. 3), and that, therefore, the trial court's instruction to the jury that such coupons were "writings" (R. 101) was error (Pet. 5, 13–14). However, it is clear, as we showed in detail in our brief in opposition in *Andrews* v. *United States*, No. 881, O. T. 1946, pp. 6–9, certiorari denied, 330 U. S. 821, that the statutory description of certain specified documents and "other writings" comprehends all of the documents enumerated in the statute, as well as all other documents, written or printed, so as to protect the general government against the consequences that might result from forgery, alteration, or counterfeiting of papers or documents in connection with its functions. See *Cross* v. *North Carolina*, 132 U. S. 131, 138. Moreover, all the reported decisions that have considered the question have concluded that a ration coupon is a "writing" within the meaning of Section 28 of the Criminal Code. *United States* v. *Serpico*, 148 F. 2d 95 (C. C. A. 2); *United States* v. *Raskin*, 52 F. Supp. 343, 345 (E. D. N. Y.); *United States* v. *Mullin*, 51 F. Supp. 785, 787 (E. D. Mo.).

CONCLUSION

The judgment of the circuit court of appeals affirming petitioners' convictions on count 2 of the indictment is clearly correct and the petition for a writ of certiorari presents no question of importance. Accordingly, we respectfully submit that the petition should be denied.

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NOVEMBER 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947